

Comparative Analysis of Divorce in the Perspective of Islamic Law and Indonesian Positive Law

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Article Info	Abstract
Article History Received : 2026-07-02 Revised: 2026-07-14 Published: 2026-07-30 Keywords: Divorce, Islamic Law, Positive Law, Hadhanah, Marriage Law.	Divorce is a form of marital breakdown that is recognized in Islamic law and positive law in Indonesia. Although they have the same goal as a last resort in resolving domestic conflicts, the two legal systems have differences in setting legal terms, procedures, and consequences. This study aims to analyze divorce arrangements from the perspective of Islamic law and positive Indonesian law and examine their legal implications on the rights and obligations of the parties after divorce. The research uses normative legal methods with a legislative approach and a conceptual approach. Legal materials are obtained through literature studies which include laws and regulations, Compilations of Islamic Law, books, and scientific journals related to marriage law. All legal materials are analyzed qualitatively using descriptive-analytical methods. The results of the study show that Islamic law and positive law in Indonesia both place divorce as a last resort after peace cannot be realized. The difference lies in the implementation mechanism, where Indonesia's positive law requires that every divorce be decided through a Religious Court as a form of legal protection for the parties. Research also shows that divorce has legal consequences for child custody, alimony, and the rights and obligations of ex-spouses. Therefore, the harmonization between the principles of Islamic law and positive Indonesian law is an important factor in realizing legal certainty, justice, and protection of the rights of the parties after divorce.

I. INTRODUCTION

Marriage is a birth and mind bond between a man and a woman that aims to form a happy and eternal family based on the One Godhead as regulated in Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019. From the perspective of Islamic law, marriage is also seen as a strong contract (*mitsaqan ghalizhan*) to realize a sakinah, mawaddah, and rahmah domestic life. Therefore, divorce is basically a permissible act, but it becomes a last resort when the purpose of marriage can no longer be realized (Manan, 2001).

Although divorce is a recognized right in both Islamic law and positive Indonesian law, the practice of divorce continues to show an increase year by year. Economic factors, prolonged disputes, domestic violence, infidelity, and leaving one party are the dominant causes of divorce. The high divorce rate shows that family conflict resolution is not yet fully effective, so divorce is still the main choice for many couples. This condition causes various legal consequences, both

for the husband and wife and for the children born from the marriage (Syaifudin, 2012).

The regulation of divorce in positive Indonesian law has different characteristics from Islamic law. Islamic law places divorce as part of family law based on the provisions of the Qur'an, hadith, and the opinions of the jury, while Indonesia's positive law regulates divorce through the Marriage Law, Government Regulation Number 9 of 1975, and the Compilation of Islamic Law. These differences can be seen in the terms, procedures, reasons for divorce, and legal consequences caused. Therefore, a study is needed that not only explains normative provisions, but also analyzes the similarities and differences between the two legal systems in realizing legal certainty and protection of the family (Soemiyati, 2004).

A lot of research has been done on divorce. Abdul Manan (2001) examines the problem of divorce due to adultery in the Religious Court, while Muhammad Syaifudin (2012) focuses more on the legal aspect of divorce in general. Several other studies discussed the consequences of

divorce law on child custody and the division of joint property. However, there is still limited research that specifically compares the concept of divorce in the perspective of Islamic law with positive Indonesian law through an analysis of its legal conditions, procedures, reasons, and consequences in one comprehensive study. Thus, this research has a space for novelty through a comparative approach to the two legal systems.

Based on this background, this study aims to analyze the concept of divorce from the perspective of Islamic law and positive Indonesian law and identify its similarities, differences, and legal implications for the settlement of divorce cases in Indonesia. This research is expected to contribute to the development of family law and become a reference for academics and legal practitioners in understanding the harmonization between Islamic law and national law.

II. RESEARCH METHODS

This research is a normative legal research that aims to analyze the divorce arrangement in the perspective of Islamic law and positive Indonesian law through a comparative legal approach. The research uses a statute *approach* to examine the provisions governing divorce in Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, Government Regulation Number 9 of 1975, and the Compilation of Islamic Law. In addition, a *conceptual approach* is used to examine the concept of divorce based on Islamic law doctrine and family law theories that have developed in the academic literature (Marzuki, 2010).

The legal materials used consist of primary legal materials, namely laws and regulations that regulate divorce, and secondary legal materials, in the form of books, scientific journals, and the opinions of experts who discuss marriage law and Islamic family law. The collection of legal materials is carried out through library *research*, then analyzed qualitatively by descriptive-analytical methods. The analysis was carried out by comparing the concept of divorce according to Islamic law and positive Indonesian law to identify similarities, differences, and implications for the application of divorce law in Indonesia.

III. RESULTS AND DISCUSSION

A. Divorce Regulation in the Perspective of Islamic Law and Indonesian Positive Law

Divorce is one of the ways of breaking the marriage bond which is recognized in both Islamic law and positive law in Indonesia. Nonetheless, the two legal systems have different characteristics in regulating the terms, procedures, and reasons for divorce. In Islamic law, divorce is seen as an act that is basically permissible (*mubah*), but it is the last resort when the purpose of marriage to create a family that is *sakinah*, *mawaddah*, and *rahmah* can no longer be maintained. Therefore, scholars place divorce as a solution that is only used when peace efforts are no longer possible (Al-Husaini, 1993).

In Islamic jurisprudence, divorce is not only known in the form of *talaq* imposed by the husband, but also through other mechanisms such as *khulu'*, *fasakh*, *li'an*, and other forms of marriage termination according to the underlying cause. Each form of divorce has different legal terms and consequences, both for the marital status and for the rights and obligations of the parties. In addition, scholars from various schools have different views on the harmony and legal conditions of divorce, especially regarding the form of *talaq*, the husband's will, and the condition of the wife at the time of *talaq* (Al-Kasani, t.t.; Al-Zuhayli, 1989).

In contrast to Islamic law which focuses on the provisions of *fiqh*, Indonesia's positive law regulates divorce more formally through Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, Government Regulation Number 9 of 1975, and the Compilation of Islamic Law. All divorces must be decided by the court after the judge first tries to reconcile the parties. This provision shows that national law views divorce not only as a personal affair of husband and wife, but also as a legal event that requires state supervision to ensure legal certainty and protect the rights of the parties, especially women and children (Soemiyati, 2004).

The most fundamental difference between the two legal systems lies in the procedure for

implementing divorce. In classical Islamic law, talaq can in principle be imposed by the husband if he fulfills the pillars and conditions determined according to fiqh. On the other hand, in Indonesia's positive law, talaq only has legal consequences after it is pronounced in front of the Religious Court and obtains a court determination. This arrangement is a form of family law reform that aims to reduce the practice of unilateral divorce while providing legal protection for wives and children (Manan, 2001).

Although there are differences in the implementation mechanism, both Islamic law and positive law Indonesia have the same goal, which is to make divorce the **last resort** (*ultimum remedium*) in resolving domestic conflicts. Both legal systems prioritize peace efforts before divorce is implemented, although the mechanisms used are different. In Islamic law, peace efforts are carried out through family counseling or the appointment of *hakam*, while in positive Indonesian law it is realized through the obligation of mediation and examination in the Religious Court. This equation shows that the protection of family integrity remains the main goal of both legal systems (Syaifudin, 2012).

Based on the results of the analysis, it can be understood that Indonesia's positive law basically adopts the basic values of Islamic law regarding divorce, but develops it through stricter procedural mechanisms to ensure legal certainty and protection for the parties. Thus, the difference between Islamic law and positive law in Indonesia does not lie in the purpose of regulating divorce, but in the form of supervision and the mechanism of its implementation. The harmonization of the two legal systems shows that the establishment of national family law seeks to accommodate the principles of Islamic sharia while meeting the needs of modern society that demands legal certainty and protection of the human rights of the parties.

B. Legal Implications of Divorce on the Rights and Obligations of the Parties

Divorce not only ends the legal relationship between husband and wife, but also has various legal consequences for the rights and obligations of the parties. In Islamic law and positive Indonesian law, the breakdown of marriage does not erase all responsibilities born during the course of the marriage, especially those related to child maintenance, maintenance, and protection of the rights of ex-wives. Therefore, the regulation of the legal consequences of divorce has an important role in ensuring the realization of justice after the end of the marriage bond (Soemiyati, 2004).

One of the most important legal consequences is regarding child custody (*hadhanah*). In Islamic law, *hadhanah* is an obligation to maintain, care, educate, and protect children who are not able to take care of themselves. The compilation of Islamic Law gives priority to the right of *hadhanah* to the mother for children who have not been *mumayyiz*, as long as there is no legal reason that causes the right to be transferred to another party. The arrangement is based on the consideration that the best interests of the child should be the primary basis in determining who is entitled to maintenance after divorce. However, the court still has the authority to transfer the right to *hadhanah* if the right holder is no longer able to guarantee the interests of the child.

In addition to child custody, divorce also creates obligations regarding child support and maintenance costs. Based on the Compilation of Islamic Law, fathers are still obliged to bear the cost of maintaining and educating children according to their abilities until the child reaches adulthood or is able to stand on his own. If there is a dispute regarding the amount of alimony and the implementation of *hadhanah*, the settlement is the authority of the Religious Court. This provision shows that divorce does not remove the parents' responsibility for the child, but only ends the relationship as husband and wife.

From Indonesia's positive legal perspective, the regulation on the consequences of divorce shows a strong orientation towards the protection of children's rights. The state not only regulates the mechanism for the

breakdown of marriage, but also ensures that the child still has the right to upbringing, education, and maintenance. Thus, *the best interests of the child* are the main principle that must be considered by judges in every divorce case. This principle is also in line with the values of Islamic law that places the welfare of children as the main goal in regulating hadhanah (Manan, 2001).

On the other hand, divorce also has implications for the rights and obligations of ex-husbands and wives. The ex-husband still has certain obligations in accordance with the court decision, such as providing iddah, mut'ah, or other obligations determined based on the provisions of applicable law. On the other hand, ex-wives have the right to obtain legal protection for rights arising from the breakdown of marriage. The arrangement reflects that divorce law in Indonesia is not only oriented towards the termination of the marital relationship, but also on the settlement of legal consequences arising after divorce.

Based on the results of the analysis, both Islamic law and positive Indonesian law have the same goal in regulating the consequences of divorce law, namely providing protection for the rights of the parties after the breakup of marriage. The difference lies in the implementation mechanism and the form of supervision by the state. Islamic law emphasizes more normative aspects sourced from sharia, while Indonesia's positive law strengthens it through judicial mechanisms and judicial supervision. The harmonization of the two legal systems shows that the protection of children and ex-spouses is an integral part of the purpose of family law in Indonesia.

IV. CONCLUSIONS AND SUGGESTIONS

A. Conclusion

Based on the results of the study, it can be concluded that the arrangement of divorce in Islamic law and positive law in Indonesia has the same goal, which is to make divorce the last resort (*ultimum remedium*) in resolving domestic conflicts. Islamic law regulates divorce based on the Qur'an, hadith, and the

opinions of the jurists by focusing on the fulfillment of the harmony and conditions of divorce, while positive Indonesian law regulates divorce through Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, Government Regulation Number 9 of 1975, and the Compilation of Islamic Law which requires every divorce to be decided through a Religious Court. These differences show that national law adopts the principles of Islamic law while strengthening them through judicial mechanisms to provide legal certainty and protection for the parties.

Divorce also has various legal consequences that are not only related to the breakdown of the marital relationship, but also concern the rights and obligations of ex-spouses and the protection of children. The regulation of hadhanah rights, child support, and parental obligations after divorce shows that both Islamic law and positive Indonesian law place the best interests of the child as the top priority. Therefore, despite differences in the regulatory mechanisms, the two legal systems have the same orientation, namely realizing justice, legal certainty, and protection of the rights of the parties after divorce.

B. Suggestions

The government together with the Supreme Court need to continue to strengthen the implementation of marriage law through improving the quality of judicial services, optimizing the implementation of mediation, and providing legal counseling to the public regarding rights and obligations in married life. These efforts are important to reduce the divorce rate while increasing public awareness that divorce is the last step after all peace efforts have failed.

In addition, judges of the Religious Court are expected to continue to prioritize the principle of protection of women and children in every settlement of divorce cases, especially those related to the rights of hadhanah, alimony, and the fulfillment of post-divorce rights. For the next researcher, research on divorce is expected not only to use a normative approach, but also to be

developed through empirical research on the effectiveness of the implementation of mediation, the implementation of hadhanah decisions, and the fulfillment of children's rights after divorce so as to provide a more comprehensive picture of family law practice in Indonesia.

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